Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1579

REV. DIANNE FENNELL,

Appellant,

vs.

ROSALIE BUTLER, Councilwoman; DONALD D. WOZNIAK; HARRIET LANSING, City Attorney; PHILIP B. BRYNE, Deputy City Attorney; JAMES M. CAMPBELL; and the MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Rev. Dianne Fennell
Attorney Pro Se
Appellant -Petitioner
1612 Randolph Avenue
St. Paul, Minnesota 55105

INDEX

	page
OPINIONS BELOW	2-3
JURISDICTION	3
QUESTIONS PRESENTED	3-4
STATEMENT OF CASE	5-14
CONSTITUTIONAL & STATUTORY PROVISIONS	
INVOLVED	5
LAWS OF UNITED STATES . . .	5
U.S. CONSTITUTION AMEND. IV & V	5, 10 12-14
U.S.C. 42 § 2000	3,5,7, & 9-15
42 U.S.C. § 1981-1995. . . .	5-13
28 U.S.C. § 2201-2202 1331-1343 (1-4). .	5-13
F.R.C.P. RULE 6(d).	6,8
MINNESOTA STATUTES 147.171 . . M.S.A. (1976),	5, 6,& 9-14
ST. PAUL, MINNESOTA AMENDED ORDINANCE 16321.	5,7
REASONS FOR GRANTING WRIT . .	.14--15
CONCLUSION	15

TABLE OF SUPPORTING AUTHORITIES

cases:	page
Jenkins v. Blue Cross Mut. Hospital Ins. Inc. 538 F 164 (1976).	.10
COHEN v. ILL., Inst. of Technology, C.A. III (1975, 524 F 2d 818 certi. denied 96 S. Ct. 1683.	10
Lopez v. Arrowhead Ranches C.A., Ariz., 1975, 523 F. 2d 924 .	10
Lindsay v. City of Seattle Wash. 548 P. 2d 32 D. . . .	10---12
Alexander v. Gardner-Denver Co. 415 US 36, 39 L. ed 2d 147, 94 S Ct. 1011.	12
Perry v. Grenada Municipal Separate School Dist. (1969, D.C. Miss.) 300 F. Supp.748	12---13
Johnson v. Cincinnati (1971), CA6, Ohio, 450 F 2d 796	.13---14
Williams v. San Francisco Unified School District (1972, D.C. Cal.), 340 F Supp. 438. .	14
Cohn v. Chesterfield County School Bd. (US) 36 L ed 2d 408	14

INDEX TO APPENDIX

	page
U.S.D.C.Order dtd.Sept.23, 1977, (Alsop-J)	.1-4 A
U.S.C.A. 8th. Cir. Order dtd. . .	6 B
Feb.6, 1978	(1-6) 10 B
U.S.C.A.8th. Cir. Order dtd. Feb. 28, 1978, denying rehearing . petition	. 11 C
U.S.C.A. 8th. Cir, Order denying reconsideration	. 12 D
U.S.D.C. Minn. 3rd. Div. (Alsop-J) Order dated. Jan. 9, 1978 denied reconsider,& denied plaintiff summary judgement	(1-2)--E . 14-E
U.S.D.C.(ALSOP-J)Order dtd. Feb.1 1978, plaintiff motion without oral argument,Minn. .	15 F .(1-2) . . 16 F
St. Paul, Minn. Amended Ordinance 16321, dtd. July 31, 1977	17 G . (1-9) . 25 G
U.S.D.C. Appeal Notice of Alsop-J, Order dtd. Sept.23, 1977, denying injunction. . . .	26 H
M.S.A. added by laws 1976, c222 § 42 eff. July 1, 1976 . . .	27 I
License of Fennell former(M.State Bd.) married name Saunders . . .	28 J

INDEX TO APPENDIX

page

Letter from the State Bd. Medical Examiners, Minn. state, by Poore, Secretary, there are no certified schools for massage in Minn. . . . 29 K

Articles of Inc. of Massage school by Gray, atty. rep. other plaintiffs; Smith, et al (1-3-1) in case #U.S.D.C. 3-77CIV352 Minn.. 32 L

U.S.C.A. 8th. Cir. Notice of Appeal dtd. March 4, 1978, by, Rev. Fennell, objecting to joining of the cases & M.S.A. 147.171, Minn. . . . . 33 M

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

NO.

REVEREND DIANNE FENNELL,

Petitioner,

v.

ROSALIE BUTLER, Councilwoman, DONALD D. WOZNIAK, HARRIET LANSING, City Attorney, PHILIP B. BRYNE, Deputy City Attorney, JAMES M. CAMPBELL, and the MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THIS COURT:

Rev. Dianne Fennell, prays that a Writ of Certiorari issue to review a judgement of the United States

Court of Appeals for the Eighth Circuit entered on February 6, 1978, a Petition for Rehearing subsequently being denied by Order of February 28, 1978, and motion for reconsideration being denied by Order of March 10, 1978.

OPINIONS BELOW

The opinion and Order of the United States District Court for the State of Minnesota, Third Division, entered on September 23, 1977, is reproduced in the Appendix A (App. 1), the opinion and judgement of the United States Court of Appeals for the Eighth Circuit, entered February 6, 1978, included here Appendix B, and the Order of that Court denying Petition is included here as Appendix C, the Order of that Court denying motion to reconsideration, is reproduced in the Appendix D, entered on March 10, 1978. The opinion and Order of the United States District Court for the State of Minnesota, Third Division, entered on January 9, 1978, is reproduced in the Appendix E, and this Courts Order entered February 1, 1978, reproduced in the

Appendix F, all reprodeced and included herein the Apendix, & appeal Appenxix H.

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case the judgement of the United States District Court, Third Division, of Minnesota, was entered on September 23, 1977, is grounded upon 28 U.S.C. § 2201 & 2202; 1331, 1343 (1-4), 42 U.S.C. § 1981-1995 and 42 U.S.C. § 2000 et seq.

QUESTIONS PRESENTED

This is an case by Rev. Dianne Fennell, from an Order and judgement of the United States Court of Appeals, for the Eighth Circuit, dated February 6, 1978, of the joining Fennell case with another case (Charles Smith et al, v. City of St. Paul, Minnesota, et al.), and ignoring the important issues and remanding the question of injunction to the United States District Court, Third Division, of Minnesota.

1. Should a United States District Judge, be required to compel an assistant Minnesota Attorney General and a

State Agency, the "Minnesota State Board of Medical Examiners," to obey a State Statute M.S.A. 147.171, and issue to Appellant a permanent massage license?

2. Can City goverment legally practice sex discrimination which is applied to an occupation comprised solely of women?

3. Should an Attorney Pro Se, be forced to join her case with a lawyer who has no real interest in winning the case?

4. Should lawyer Earl P. Gray, for the other plaintiff's in case (Charles Smith, et al v. City of St. Paul, et al.) , United States District Court of Minnesota, Third Division, File No. 3-77 CIV 352, United States Court of Appeals, for the Eighth Circuit, File No. 77-1822, who also owns the only massage school in the State of Minnesota, be allowed to sabotage this case for his own personal gain?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case, arising under the Constitution of the United States, the laws of the United States, the Constitution.

The Vth and XIV Amendments to the Federal Constitution and laws of the state of Minnesota. Title 28 U.S.C. § 2201-2202; 1331, 1343 (1-4), Title 42 U.S.C. § 1981-1995and 42 § 2000 et seq., and M. S.A. 147.171, Session Laws 1976, Ch.222, § 42, effective July 1, 1976.

STATEMENT OF CASE

On July 25, 1977, Rev. Fennell, filed and action in United States District Court for the District of Minnesota, Third Division, seeking to determine the Constitutionality of a recently enacted St. Paul City Ordinance No. 16321, Amendment (Apendix G), which would require needless and restrictive educational qualifications which would in effect abolish the occupation of massagist, even though the practice of massagist is authorized and duly licensed by a State

agency. In August, 1977 , Rev. Fennell, filed necessary and timely papers for a motion for injunction and supporting affidavit in the United States District Court of Minnesota, and upon the day scheduled for hearing. It was determined by (Alsop-J.), that Rev. Fennell, had failed to comply with "His special rules of a 14 day notice by application with his personal secretary." Which required another hearing because of his special rules, contrary to Rule 6 (d), of the F. R.C.P. Finally, a desicision of Order (Alsop-J.), was rendered dated September 23, 1978, (Apendix A), and a timely appeal was perfected and filed (Apendix H), After many needless post ponements which were uncalled for and latter after throught out the case. The next issue is that (Alsop-J.), failure to enforce M.S.A. 147.171 (1976), (Apendix I), when it was brought to his attention that, Special Assistant Minnesota Attorney General Robert T. Holley, representing a state agency, the Minnesota State Board of Medical Examiners, refused to advise his client to obey the laws enacted by the Minnesota

State Legislature and issue a permanent massage license to Petitioner, Rev. Fennell. Rev. Fennell, has been duly licensed by the Minnesota State Board of Medical Examiners, (Appendix J), according to Arthur W. Poore, Executive Secretary of the Minn. State Board of Medical Examiners there are no schools registered with the Department of Education in the State of Minnesota, to teach massage. (Appendix K), dated August 1, 1977.

An occupation which is licensed and sanctioned by State Statute cannot be circumvented or abolished by a lower governmental unit, or abolished by a city Councilwoman's inacted Ordinace No. 16321 because she was apparently just seeking publicity for her re-election. However sauna and massage establishments in St. Paul, Minnesota, employ all women and this Ordinance No. 16321, is an invictive form of sex discrimination by a local govermental unit. In violation of 42 U.S.C. § 2000.

That joining my case with that of lawyer Earl P. Gray's(a former assistant U. S. District of Minn. attorney), Charles

Smith, et al, v. City of St. Paul, et al. United States Eighth Circuit Court of Appeals, File No. 77-1822, which petitioner, strongly objected to because of Mr. Gray's, secret ownership of a sauna school for massage, (Appendix L), which he incorporated and is operating for personal profits, in that he sabotages his clients case. This enterprising lawyer has engineered it so that no matter which way the case goes he'll obtain financial gain. He'd never thought about a school for sauna employee's if he hadn't been involved in this massage establishments case. (Apendix M), notice of appeal.

RULE 6 (d) F.R.C.P

U.S. District Court Judge Donald D. Alsop's decision Order dated September September 23, 1977, denying Rev. Fennell injunctive relief using the erroneous premis that a State license to practice massage would not prohibit the City of St. Paul, Minnesota, from undue restrictive measures and abolishing massagist in the City of St. Paul, Minn., by legislation. The Courts functions are to require

govermental officials to obey the statutes enacted by the State legislature unless declared otherwise. That is why I, find ourselves in the federal Court, because it's believed that the State Courts wouldn't obey State law's and we find that (Alsop-J), doesn't wish to Order Mr. Holley, Special Assistant Attorney General for Minnesota, to issue a permanent massagist license to Rev. Fennell.

The Minnesota State Legislature enacted M.S.A. 147.171, (1976, which enacted as Chapter 222, § 42 Session Laws of 1976, effective date July 1, 1976.

That this case raises the important issue of sex discrimination as practiced by a governmental unit exploiting sex discrimination against an occupational class of citizens which is composed, for all practical purposes, of women and

" * * * Title VII to include state agencies with the statute's parameters. Pub. L. No. 92-261, § 2 (1), (3), (5), 86Stat. 103, amending 42 U.S.C. § 42 2000e (Supp. 1973), see NAACP v. ALLEN, 493 F. 2d at 621 (1974).

That in Jenkins v. Blue CrossMut. Hospital Ins., Inc., 538 F. 2d 164 (1976), includes sex discrimination in the Civil Rights Act 1964. Civil Rights Act 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000 et seq. "A private conspiracy to cause one to receive unequal treatment from a State or from a State Agency would violate this section." Cohen v. Illinois, Institute of Technology, C.A. III." 1975, 524 F. 2d 818, certiorari denied 96 S. Ct. 1683." "Under this section providing damage remedy to one who is injured by conspiracy entered into for purposes ofdepriving any person or class of persons of equal protection of the laws or equal privileges and immunities under the laws, action is restricted to injuries inflicted upon the victim because of his status as member of the identifiable class, and statutory "purpose to deprive of equal rights" requirement is inferred from racial or other class motivation underlying tortious conduct." Lopez v. Arrowhead Ranches, C.A., Ariz. 1975, 523 F. 2d 924.I In "City of Seattle is an "employer" under Title VII of Civil Rights

Act 1964 relating to discrimination in employment and City is subject to its provisions. Civil Rights Act 1964, § § 701 et seq., 703 (a) (2) as amended 42 U. S.C.A. § § 2000e et seq., 2000e-2 (a) (2) II "Test of vality of employee slection procedures under Civil Rights Act provisions relating to discrimination in employment is comparable to test of their vality over long run under the Fourteenth Amendment. U.S.C.A. Const. Amend. 14. III " It is not enough that employment procedures utilized by employers are fair in form, they must be fair in operation to comply with Civil Rights Act provisions relating to discrimination in employment." Civil Rights Act 1964, § 706 (g) as amended 42 USCA § 2000e5(g).IV"State and local laws cannot stand if they impede, burden or frustrate purposes of employment provisions of Civil Rights Act. USCA Const. Art. 6, cl. 2; Civil Rights Act. of 1964, § § 701 et seq., 703 (a)(2) 706 (g) as amended 42 USCA § § 2000e et seq., 2000e-2(a)(2), 2000e-5(g). I,II,& III, IV all from Lindsay v. City of Seattle, Wash., 548 P.2d 32 D.

Since a City is an employer and a person it by virtue of licensing power can determine who will be allowed to work as massagists, then it would follow that it would be liable Under 42 U.S.C. § 2000e. "Under Title VII of the Civil Rights Act 1964, 42 USCS § § 2000e et seq., which it requires equal employment opportunities, and which provides for consideration of employment-discrimination claims in several forms such as the Equal Employment Opportunity Commission, state and local agencies, and federal Courts, submission of a claim in one forum does not, in general, preclude a later submission to another." Alexander v. Gardner-Denver Co. "There can be no prospective waiver of an employee's rights under Title VII of the Civil Rights Act of 1964(42 USCS § § 2000 e et seq.), which requires equal employment opportunties." Alexander v. Gardner -Denver Co,, 415 US 36, 39 L ed 2d 147, 94 S Ct. 1011.

In Perry v. Grenada Municipal Separate School Dist. (1969, D.C. Miss.), 300 F. Supp. 748, "General policy of municipal school board denying admission to un-

wed mothers solely because of their status as such violates their right of equal protection under the law", which had a definate sexual connotation against women, and again in Johnson v. Cincinnati (1971), CA6 Ohio 450 F 2d 796 stated."In an action charging the City of Cincinnati the City's Civil Service Commission, and individual members of the Commission with violating 42 USCS § 1983 & 1985 by refusing to accept plaintiff's application for employment to the position of Housing Inspector soley on the basis of her sex, the District Court's ruling that the plaintiff's complaint failed to state a cause of action on theory that these sections have been pre-empted on this issue by 42 USCS § 2000e-2 was improper." Johnson v. Cincinnati (1971), ca6 Ohio, 450 F 2d 796." "School Boards maternity leave policy, which requires pregnant teacher to start maternity leave, without pay, at lease two months before the anticipated birth, is violative of the equal protection clause of the 14th. Amendment because it singles out pregnant teachers for a classification without any rational rela-

tionship to any legitimate objective of the school district." Williams v. San Franscisco Unified School District, (1972 ,DC Cal.), 340 F Supp. 438. "Regulation of School board requiring women teachers to take leave of absence from duties at the end of fifth month of pregnancy violates the equal protection clause of the Fourteenth Amendment." Cohn v. Chesterfield County School Board (1971, DC Va.), 326 F Supp 1159, affd (CA 4) 467 F2d 262, op withdrawn by order of Ct. and revd on other grounds (Ca4) 474 F2d 395, cert.gr (US) 36 L Ed 2d 408, 93 S Ct 1925."

REASONS FOR GRANTING WRIT

Petitioner maintains that her Federal Civil Rights and Federal Constitutional Rights, are being violated by the City of St. Paul, Minnesota, Council, and that the United States District Court of Minnesota, and the Eighth Circuit Court of Appeals, errored in their findings and that M.S.A. 147.171, (1976), should be inforced upon the State officers. Further that this action involved whole and solely discrimination based solely again-

st women in violation of the afore said laws and Statutes including 42 U.S.C. § 2000 et seq.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

Rev. Dianne Fennell

/s/ Rev. Dianne Fennell
REV. DIANNE FENNELL
Attorney Pro Se
1612 Randolph Avenue
St. Paul, Minnesota 55101

APPENDIX

I.

District Court's Memorandum Order Denying Rev. Fennell's Preliminary Injunction Motion

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
3-77 Civ. 338
REV. DIANNE FENNELL,

Plaintiff,

v.

ROSALIE BUTLER, Councilwoman; DONALD D. WOZNIAK; HARRIET LANSING, City Attorney; PHILIP B. BYRNE, Deputy City Attorney; JAMES M. CAMPBELL; and THE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Defendants.

MEMORANDUM ORDER

REV. DIANE FENNELL appeared pro se.

Harriet Lansing, City Attorney, by THOMAS M. SIPKINS, Esq., Assistant City Attorney, appeared for defendants Butler, Lansing and Byrne.

ROBERT M. MAHONEY, Esq., Geraghty, O'Loughlin & Kenney, St. Paul, Minnesota, appeared for defendants Wozniak and Campbell.

Warren Spannaus, Attorney General, State of Minnesota, by ROBERT T. HOLLEY, Esq., Special Assistant Attorney General, Minneapolis, Minnesota, appeared for defendant Minnesota State Board of Medical Examiners.

This matter comes before the court on the plaintiff's motion for a preliminary injunction.

The plaintiff has been and is the operator of a sauna located in the City of St. Paul, Minnesota, and was and is herself licensed by the City as a masseuse. On November 20, 1970, the plaintiff was registered to practice massage by the defendant Minnesota State Board of Medical Examiners.

On August 29, 1977, amendments to the City's sauna and massage parlor ordinance took effect. The amendments require that the plaintiff pass an examination testing her competence to practice massage in order to retain her City license. If she should fail the examination, she would be required to undertake seventy hours of training in physical therapy, anatomy, physiology, physical culture, massage, hydrotherapy and/or hygiene and to take and pass another such examination in order to retain her license. The amendments also restrict the plaintiff's sauna's hours of operation to the period from 8:00 A.M. until 10:00 P.M. daily.

The plaintiff seeks *pendente lite* to restrain the City's enforcement of the amended ordinance's licensing provisions and restrictions on hours of operation and to compel the issuance of a license to practice massage by the Board of Medical Examiners.

In order to justify the issuance of a preliminary injunction, the moving party has the burden of showing a substantial probability of success at trial and irreparable injury to herself absent injunctive relief. *American Train Dispatchers Ass'n v. Burlington Northern, Inc.*, 551 F.2d 749, 751 (8th Cir. 1977); *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973). Thus, the plaintiff's right to a preliminary injunction depends upon her ability to demonstrate a substantial probability that she will succeed in

establishing that the ordinance's licensing requirements and limitations on hours of operation deny her due process and that the Board of Medical Examiners' refusal to issue a permanent license to her denies her equal protection.

Even if, as the plaintiff suggests, the amended ordinance were unwise and unnecessary, the ordinance is not necessarily unconstitutional. As long as the ordinance's licensing provisions and limitation on hours of operation might reasonably further legitimate public interests, it is not to be held a denial of due process. It is not the function of the court to usurp the role of the City's elected officials and to impose its own views, whatever they may be, as to the usefulness or lack of usefulness of such legislation. The day has long since passed when a court may substitute its social and economic beliefs for the judgment of a legislative body which has been elected to propose, to consider and to adopt legislation. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Therefore, based on the record presently before the court it seems unlikely that the plaintiff will succeed in establishing her claim that the amended ordinance denies her due process.

Likewise, the plaintiff seems unlikely to succeed on her claim against the Board of Medical Examiners. It is clear that Minn. Stat. § 147.171 does not authorize the Board of Medical Examiners to issue to the plaintiff a permanent license to practice massage. Minn. Stat. § 147.171 authorizes the issuance of permanent licenses only to persons licensed pursuant to Laws 1935, Chapter 245. The plaintiff was never so licensed and thus is ineligible for a permanent license.

Moreover, it is also clear that, even if the Board of Medical Examiners were to grant the plaintiff a permanent license she would be entitled to no right or privilege which she does not now possess. It is not necessary that a person engaged in

the practice of massage within the State of Minnesota hold a license issued by the Board of Medical Examiners. If the plaintiff had a permanent license issued by the Board of Medical Examiners, she would also need a license issued by the City if she wished to practice massage within the City's limits. *Cf. Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 143 N.W.2d 813 (1966). Because the plaintiff is denied no right or privilege granted to others, there is no denial of equal protection.

Because the plaintiff has failed to demonstrate a substantial probability that she will succeed in establishing any of her claims, it is not necessary that the court reach the issue of irreparable injury.

Upon the foregoing,

IT IS ORDERED That the plaintiff's motion for a preliminary injunction be and hereby is denied.

Dated: September 23, 1977.

DONALD D. ALSOP
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 77-1782 and 77-1822

No. 77-1782

Rev. Dianne Fennell,

Appellant,

v.

Rosalie Butler, Councilwoman; Donald D. Wozniak; Harriet Lansing, City Attorney; Philip B. Byrne, Deputy City Attorney; James M. Campbell; and The Minnesota State Board of Medical Examiners,

Appellees.

Appeal from the United States District Court for the District of Minnesota

No. 77-1822

Charles Smith, individually and d/b/a Red Carpet Sauna; C. J. Russell, Inc., d/b/a Civic Center Sauna; L. D. Dagell, Inc., d/b/a The Massage Emporium; Cosmopolitan, Inc., d/b/a Cosmopolitan Sauna; Lee Lenore Ehrlichman individually and d/b/a Lee Le Lenore's Sauna; St. Paul Comfort Center, Inc., d/b/a St. Paul Comfort Center,

Appellants,

v.

The City of St. Paul, Minnesota; George Latimer, individually and as Mayor of the City of St. Paul; Harriet Lansing, individually and

Appeal from the United States District Court for the District of Minnesota.

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EXHIBIT B-2

* * *

ORDER

Submitted: January 30, 1978

Filed: February 6, 1978

Before LAY, BRIGHT and WEBSTER, Circuit Judges

LAY, Circuit Judge

These two appeals arise from separate orders of the district court, the Honorable Donald D. Alsop presiding, denying the plaintiffs' motion for preliminary injunction. The Fennell appeal, No. 77-1782, relates to an attempt by the plaintiff to restrain the City of St. Paul from enforcing an amended ordinance relating to licensing provisions and restrictions on the hours of operation of saunas and massage parlors, and to compel the issuance of a license to practice massage by the Minnesota State Board of Medical Examiners.

In the Smith appeal, No. 77-1822, the plaintiffs, owners and operators of massage and sauna parlors in the City of St. Paul, sought to challenge the constitut-

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EXHIBIT B-3

* * *

ORDER

tionality of the same ordinance, which changed the required closing hours for massage parlors from 1:00 A.M. to 10:00 P.M. The district court, in refusing to grant a preliminary injunction, did so on the basis of this court's traditional tests governing the issuance of preliminary injunctive relief: (1) whether the moving party has shown substantial probability of sucess at trial; and (2) whether the moving party will suffer irreparable injury in the event the injunction is denied. The district court did, however, grant a temporary injunction pending appeal, stating:

> In the present context, the court remains of the opinion that there is no probability that the plaintiffs will succeed on the merits. however, it recognizes that there are serious questions going to the merits and that there is some possibility that an injunction may issue. where there are

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EXHIBIT B-4

* * * *

ORDER

such questions and where the equities decidedly favor the appealing party, the court deems it appropriate that an injunction issue pending appeal.

The grant or denial of a preliminary injunction may of course be reversed only if the lower court abused its discretion or based its decision upon an erroneous legal premise. The Second Circuit has held that a preliminary injunction should issue

> upon a clear showing of either (1)probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Gresham v. Chambers, 501 F. 2d 687, 691 (2d Cir. 1974), quoting Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973).

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EXHIBIT B 5

* * * *

ORDER

The Ninth Circuit adopted the Gresham test in 1975 in William Inglis & Sons Baking Co. V. ITT Continental Baking Co., 526 F. 2d 86, 88 (9th Cir. 1975).

In view of the statement by the trial court in granting a temporary injunction pending appeal and the legal and factual circumstances of this particular case, we feel that the alternative tests of the Second and Ninth Circuits should be conconsidered by the district court. On remand the district court should balance the hardship to the parties that would result from granting or denying the preliminary injunction. If the balance tips decidedly towards the plaintiffs and the plaintiffs have raised questions serious enough to require litigation, ordinarily the injunction should issue.

We strongly urge the district court on remand to review the issuance of the injunction and, in view of the narrow issue involved, to consolidate plaintiffs' petitions for preliminary injunction along

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EXHIBIT B 6

* * *

ORDER

with consideration of the merits of the cases.

The order denying the preliminary injunction is vacated, without prejudice, and the cause is remanded for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EITHTH CIRCUIT

A-

EXHIBIT C

(Caption)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

77-1782		September Term, 1977
Rev. Dianne Fennell,	)	
Appellant,	)	Appeal from the U.S. District Court of Minnesota
vs,	)	
Rosalie Butler, etc., et al.,	)	

Petition of appellant pro se for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and is hereby denied.

February 28, 1978

A-

EXHIBIT D

(Caption)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No.77-1782 September Term, 1977

Rev. Dianne Fennell,)
Appellant,) Appeals from the United States District Court for the District of Minnesota
vs,)
Rosalie Butler, etc., et al.,)

Apellant's motion for reconsideration has been considered by the Court and is denied.

March 10, 1978

A-

EXHIBIT E-1

(Caption) * * * *

ORDER

Entered January 9, 1978

The above-entitled action came on for hearing upon various motions of the plaintiff filed on December 13, 1977 and upon additional motions filed January 6, 1978.

Upon all the files, records and proceedings herein,

IT IS ORDERED That the plaintiff's motion filed December 13, 1977, seeking an order vacating and setting aside the hearing on November 18, 1977 and futher vacating this court's order of December 2, 1977, which motion the court will treat as a motion to reconsider, be and hereby is in all things denied.

IT IS FUTHER ORDERED That the plaintiff's motion filed January 6, 1978 asking that this court deny all of defendants' motions for dismissal and/or summary judgement be and hereby is denied as moot, no decision being made herein on the pending motions of defendants Butler, Lansing, and Bryne for summary judgement and on the motion of defend-

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EXHIBIT E-2

ant Minnesota State Board of Medical Examiners for dismissal.

IT IS FURTHER ORDERED That the defendants' motion filed January 6, 1978 seeking this court's order denying"all defendants Judge Alsop's Memorandum order Dated December 2, 1977," which the court will consider as a motion to reconsider, be and hereby is denied.

ITI S FINALLY ORDERED That the plaintiff's motion filed January 6, 1978, seeking summary judgement against each and every defendant pursuant to Rule 56 be and hereby is in all things denied.

DATED: January 9, 1978.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

A

EXHIBIT F-1

(Caption) * * *

ORDER

Entered February 1, 1978

On January 30, 1978, the plaintiff caused to be filed a notice of motion and motion for a preliminary injunction.

The court's standing order requires a moving party to submit a memorandum of points and authorities in support of a motion no later than fourteen (14) days in advance of the date on which the motion is to be heard. The plaintiff noticed her motion for hearing on February 3, 1978; however, she submitted neither her motion papers nor any memorandum in support prior to January 30, 1978. Therefore, the court will not hear argument on the plaintiff's motion for a preliminary injunction on February 3, 1978.

Upon the foregoing,

IT IS ORDERED That any hearing on the plaintiff's motion for a preliminary injunction be and hereby is continued until further notice from the court.

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EXHIBIT F-2

IT IS FURTHER ORDERED That on or before February 8, 1978, the plaintiff shall serve upon all parties and file with the clerk any additional affidavits, exhibits or other materials which she wishes the court to consider in connection with her motion and shall serve upon all parties and lodge with the court any further memorandum of points and authorities in support of her motion.

IT IS FURTHER ORDERED That on or before February 17, 1978, any party who opposes the plaintiff's motion shall serve and file matters of record and shall serve and lodge a memorandum of points and authorities in opposition to the plaintiff's motion.

II IS FINALLY ORDERED That, pursuant to Rule 78, F.R. Civ.P., the plaintiff's motion shall be determined without oral hearing upon the written briefs unless the court shall subsequently order oral argument upon the motion.

DATED: February 1, 1978.

/s/ DONALD D. ALSOP
United States District Judge

EXHIBIT GA-6

Ordinance

Ordinance NO. [illegible]

Presented By Rosalie Wahl

Referred To _____ Committee: _____ Date _____

Out of Committee By _____ Date _____

An ordinance to amend Chapter 378 of the Saint Paul Legislative Code to provide for the licensing of masseurs and masseuses, for educational and training requirements for such licenses, and for the regulation of licensed sauna and massage parlors.

THE COUNCIL OF THE CITY OF SAINT PAUL DOES ORDAIN:

Section 1.

The first sentence of Section 378.01 of the Saint Paul Legislative Code is hereby amended to read as follows:

"378.01 -- Definitions.

(1) As used in this ordinance the terms defined in this subdivision shall have the following meanings ascribed to them:"

Section 2.

Section 378.01(b) of the Saint Paul Legislative Code is hereby amended to read as follows:

"(b) The terms term "massage", "masseur" and "masseuse" are is defined in the same manner as in Minnesota Statutes, Sections 148.33 through 148.45. To mean the rubbing, stroking, kneading, tapping, or rolling of the body with the hands.

Council Votes:

Yeas / Nays

Fuller
Ilozza
Hunt
Levine
Roethler
Schexnider
Tedesco

In Favor

Against

Adopted by Council: Date _____

Certified Passed by Council Secretary

By _____

Approved by Mayor Date _____

By _____

Approved by Department of

By _____

Form Approved by City Attorney

By Phillip B. Byrne

Approved by Mayor for Submission to Council

By _____

BEST COPY AVAILABLE

EXHIBIT G

A-7

Page 2.

for the exclusive purposes of relaxation, physical fitness, or beautification, and for no other purposes. The term "masseur" is defined to mean a male person who practices massage. The term "masseuse" is defined to mean a female person who practices massage. The practice of massage shall not include and is distinct from the practice of medicine, surgery, osteopathy, chiropractic, physical therapy, or podiatry. Persons duly licensed or registered to practice medicine, surgery, osteopathy, chiropractic, physical therapy, or podiatry, nurses who work under the direction of such persons, and athletic directors and trainers are hereby expressly excluded from the requirements of this chapter. Beauty culturists, barbers, and cosmetologists who do not give, or hold themselves out to give, massages other than are customarily given in such shops or places of business, for the purpose of beautification only, shall also be excluded from the provisions of this chapter."

Section 3.

Section 378.01(c) of the Saint Paul Legislative Code is hereby amended to read as follows:

"(c) "Massage Parlor" shall mean any room or rooms wherein a person for a fee may receive from another person a massage, or any room or rooms from which a masseur or masseuse is dispatched by telephone or otherwise for the purpose of giving a massage; provided that, no massage for a fee shall be given except in a licensed premises."

Section 4.

Section 378.01(e) of the Saint Paul Legislative Code is hereby amended to read as follows:

EXHIBIT G

A-8

Page 3.

"(e) "Adequate" or "approved" shall mean acceptable to the City-Health-Officer Director of the Division of Public Health or his agents following his determination as to conformance with public health practices and standards."

Section 5.

Section 378.02(a) of the Saint Paul Legislative Code is hereby amended to read as follows:

"(a) License Required. No person shall engage in the business of operating a sauna and/or a massage parlor either exclusively or in connection with any other business enterprise without being licensed as provided in this section. Any person who conducts such business either in whole or in part by arranging for massages by means of telephonic, verbal or written communication shall administer such massages only on a licensed premises if such massage is to be administered within the City of Saint Paul."

Section 6.

The last paragraph of Section 378.02(b) of the Saint Paul Legislative Code is hereby amended to read as follows:

"The license application shall thereafter be forwarded to the office of the City License Inspector. Such application will then be reviewed by the City-Health-Department Division of Public Health, Building-Department Division of Housing and Building Code Enforcement, Police Department, of Police, and such other departments as shall be deemed necessary. Such departments and divisions will thereafter submit their reports and recommendations to the office of the City License Inspector who will submit all of the reports and recommendations of the other departments together with the License Inspector's

EXHIBIT G

A-9

report and recommendation to the License Committee of the Saint Paul City Council. The License Committee of the Saint Paul City Council, following a public hearing, will recommend to the Saint Paul City Council either denial or approval of the license. The license shall be granted or denied by the Saint Paul City Council."

Section 7.

Section 378.06(a) of the Saint Paul Legislative Code is hereby amended to read as follows:

"(a) No such business shall employ or use any person as a masseur or masseuse, ~~as defined in Minnesota Statutes, Section 148.33,~~ unless such person is ~~registered with the State Board of Medical Examiners as provided by Minnesota Statutes, Sections 148.33 through 148.511,~~ and licensed by the City of Saint Paul. ~~Such statutory sections are hereby incorporated by reference as part of this ordinance.~~"

Section 8.

Section 378.06(b) of the Saint Paul Legislative Code is hereby amended to read as follows:

"(b) Any persons acting as a masseur or masseuse in any such business shall have their ~~registration certificate~~ license or a true copy thereof displayed in a prominent place on the licensed premises."

Section 9.

Section 378.06(h)(3) of the Saint Paul Legislative Code is hereby amended to read as follows:

EXHIBIT G

A-10

"(3) A description of any crime or other offense including the time, place, date and disposition for which the applicant has been arrested and convicted. ~~Such application shall be accompanied by the following:~~

~~(1) A true copy of the applicant's State Registration Certificate as provided by Minnesota Statutes, Sections 148.33 through 148.511.~~

~~(2)~~ (4) Photographs of the applicant taken by the Saint Paul Police Department showing both the front and side view; and

~~(3)~~ (5) A complete set of fingerprints taken by the Saint Paul Police Department.

Such application shall be processed in the same manner as provided for in the last paragraph of Section 378.02(b)."

Section 10.

Section 378.06(i) of the Saint Paul Legislative Code is hereby amended to read as follows:

"(i) No sauna and/or massage parlor for which a license has been granted by the City shall be open for business unless and until any masseurs or masseuses employed in the business have first complied with the ~~registration~~ licensing requirements of this ~~ordinance~~ chapter."

Section 11.

Chapter 378 of the Saint Paul Legislative Code is hereby amended by adding a new Section 378.06(L) to read as follows:

"(L) Each applicant for a masseur or masseuse license shall furnish with the application a diploma or certificate of graduation from a school which:

EXHIBIT G
A-11

(1) is either accredited by a recognized educational accrediting association or agency, or is licensed by the state or local governmental agency having jurisdiction over the school; and

(2) offers course work or degree programs in physical therapy, anatomy, physiology, physical culture, massage, hydrotherapy and hygiene; and

(3) has for its purpose, either wholly or in part, the teaching of the theory, method, work or profession of massage; and

(4) as a prerequisite of graduation, requires a resident course of study of not less than seventy (70) hours of instruction in the above subjects and teaching.

In the event that such applicant is not a graduate of such a school, or such course work is not a prerequisite of graduation, the applicant may present a transcript certified by the school showing the completion, with passing grades, of seventy (70) hours of course work or instruction in the above subjects and teaching.

New applicants for such licenses shall be required to comply with these requirements. Persons already licensed as a masseur or masseuse on the effective date of this ordinance shall be required to comply with these requirements within six months after that date; provided, however, that persons already licensed who have been regularly employed as a masseur or masseuse for a period of five years out of the six year period preceding the effective date of this ordinance, may apply for examination under Section 378.06(m) without meeting the educational requirements of this subsection. Any person taking the examination under Section 378.06(m) on the basis of five years' experience who fails to pass the examination, must comply with the educational requirements of this subsection within a six months after failing to pass the examination.

Section 12.

Chapter 378 of the Saint Paul Legislative Code is hereby amended by adding a new Section 378.06(m) to read as follows:

"(m) Each applicant for a masseur or masseuse license shall be required to submit to and pass an examination as to the qualifications and competence of said applicant for the practice of massage. Said examination shall be given by the Director of the Division of Public Health and by such persons as he

EXHIBIT G
A-12

may designate, in such form as he may prescribe, whether written, oral or practical, so as to determine whether the applicant has sufficient knowledge, skill, training and experience to safely and competently administer massages to the general public. Such examination shall test the applicant's:

(1) knowledge of massage and public health statutes, ordinances, rules and regulations; and

(2) knowledge of anatomy and physiology; and

(3) knowledge of the theory of massage; and

(4) knowledge and ability in practical massage.

The Director of the Division of Public Health shall notify the License Inspector of the examination results, and whether or not the applicant has demonstrated sufficient knowledge, skill, training and experience to safely and competently administer massages to the general public."

Section 13.

The last sentence of Section 378.07 of the Saint Paul Legislative Code is hereby amended to read as follows:

"A building permit shall not be issued for any such construction, remodeling, or alteration until such permit shall have the approval of the City Health Officer Director of the Division of Public Health or his agents."

Section 14.

Section 378.08 of the Saint Paul Legislative Code is hereby amended to read as follows:

EXHIBIT G

A-13

Page 8.

"378.08 -- Inspection by City Officers and Identification of Employees. During ~~business hours~~ any hours in which any person is present on the licensed premises, all saunas and/or massage parlors shall be open to inspection by City Health, Building and License Inspectors and Police officers. Upon demand by any police officer, any person engaged in providing services in any licensed premises shall identify himself giving his true legal name and his correct address."

Section 15.

Section 378.09 of the Saint Paul Legislative Code is hereby amended to read as follows:

"378.09 -- Business Hours. No customers or patrons shall be allowed to enter the licensed premises after ~~1:00 A.M.~~ 10:00 P.M. and before 8:00 A.M. daily. No customers or patrons shall be allowed to remain upon the licensed premises after ~~2:00 A.M.~~ 10:30 P.M. and before 8:00 A.M. daily."

Section 16.

The first sentence of Section 378.11 of the Saint Paul Legislative Code is hereby amended to read as follows:

"~~The City Health Officer~~ Director of the Division of Public Health shall make such rules and regulations as are reasonably necessary to the safe and sanitary operation of saunas and massage parlors."

EXHIBIT G A-14

Ordinance

Ordinance NO. [illegible]

Presented By

Referred To Committee: Date

Out of Committee By Date

Page 9.

Section 17.

This ordinance shall be in force and take effect on the thirtieth day following its passage, approval and publication.

COUNCILMEN

Yeas	Nays	
Butler		
Hoyt	5	In Favor
Heat		
Levine	2	Against
Roedler		
Sylvester		
Tedesco		

Adopted by Council: Date JUL 19 1977

Certified Passed by Council Secretary

By

Approved by Mayor: Date JUL 25 1977

By

Form Approved by City Attorney

By

Approved by Mayor for Submission to Council

By

A-

EXHIBIT H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Rev. Dianne Pennell, Plaintiff,

Civil Action File No. 3-77-338

--v--

NOTICE OF APPEAL

Rosalie Butler, Councilwoman; Donald D. Wozniak; Harriet Lansing, City Attorney; Philip B. Byrne, Deputy City Attorney; James M. Campbell; and The Minnesota State Board of Medical Examiners,

Defendants.

To: Thomas M. Sipkins, at 647 City Hall & Court House, St. Paul, Minnesota 55102. Attorney for defendants, Butler and Lansing, and Byrne.
Robert M. Mahoney, at 707 Degree of Honor Bldg., St. Paul, Minnesota 55101. Attorney, for Wozniak and Campbell.
Robert T. Holley, 717 Delaware Street S.E., Minneapolis, Minnesota 55440. Attorney, for The Minnesota State Board of Medical Examiners.

PLEASE TAKE NOTICE that the above named Plaintiff, Rev. Dianne Pennell, Attorney Pro Se, hereby notify the above named counselors for the Defendants, that she is appealing to the Eighth U.S. Circuit Court of Appeals, Judge Donald D. Alsop's, Order Dated September 23, 1977, denying a preliminary injunction.

BY: /s/ Rev. Dianne Pennell
Rev. Dianne Pennell
Attorney Pro Se
1612 Randolph Avenue
St. Paul, Minnesota 55105
Phone No. 612-698-[illegible]

Filed SEP 29 1977
Harry M. Stoen, Clerk
By [illegible] Deputy

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EXHIBIT I

first conviction, may, and, upon a subsequent conviction, shall, revoke the license of the person so convicted.
Amended by Laws 1976, c. 222, § 41, eff. July 1, 1976.

1976 Amendment. Laws 1976, c. 222, generally revised the statutory law relating to licensing of occupations. This section was modified in line with the general changes specified in section 214.001 et seq. For additional information concerning Laws 1976, c. 222, see section 214.001, note.

147.16 Temporary certificate for graduate training

The state board of medical examiners may grant, in its discretion, without examination, a temporary certificate for graduate training in medicine, surgery and obstetrics, to those applicants who furnish satisfactory proof that the applicant:

(1) Is 18 years of age or over;

(2) Is of good moral character;

(3) Has successfully completed a course in medicine, surgery and obstetrics at, and has been graduated from, a medical or osteopathic school located outside of the United States and Canada and that such medical or osteopathic school is approved by the licensing authorities of the country in which such medical or osteopathic school is located;

(4) Is duly licensed to practice medicine in all of its branches in the state, territory or foreign country in which he resides, or, not being so licensed, has passed an examination or is eligible therefor and which examination is in the judgment of the board substantially equivalent to the examination given by it to applicants for a license to practice medicine in all of its branches in this state;

(5) Has been accepted as a resident physician by a hospital situated in this state, the residency training of which has been approved by an approval agency recognized by the board; provided, however, that the state board of medical examiners shall have the authority, upon its own investigation, to approve other residency training programs in medicine, surgery and obstetrics and qualified applicants therefor. Each applicant shall set forth the starting and termination dates of a period for which he has been accepted or appointed to such residency training program; and

(6) Possesses all other qualifications which are prescribed by the rules and regulations of the board for the granting of such temporary authorization.

Amended by Laws 1973, c. 725, § 13, eff. June 1, 1973.

1973 Amendment. Laws 1973, c. 725, generally reduced the age of majority from 21 to 18. The reduction was incorporated in this section by Laws 1973, c. 725, § 13.

1. In general

Under section 147.17 providing that temporary certificate for graduate training shall entitle holder, under direction and supervision of person licensed and registered to practice medicine in state, to perform within hospital only services prescribed by and requisite to resident physician's training program does not require continuous detailed supervision of resident while carrying out medical practices for which he is training. Walstad v. University of Minnesota Hospitals, C.A.1971, 443 F.2d 634.

147.17 Powers under temporary certificate

1. In general

Under section 147.17 providing that temporary certificate for graduate training shall entitle holder, under direction and supervision of person licensed and registered to practice medicine in state, to perform within hospital only services prescribed by and requisite to resident physician's training program does not require continuous detailed supervision of resident while carrying out medical practices for which he is training. Walstad v. University of Minnesota Hospitals, C.A.1971, 443 F.2d 634.

147.171 Licensing of persons practicing massage

Any person who was licensed under Laws 1935, Chapter 245 may apply to the board of medical examiners for a permanent license. The board shall grant the request if it is satisfied that the applicant previously held a license under Laws 1935, Chapter 245.

Added by Laws 1976, c. 222, § 42, eff. July 1, 1976.

Laws 1976, c. 222, generally revised the statutory law relating to licensing of occupations. For additional information concerning Laws 1976, c. 222, see section 214.001, note.

Library References
Licenses ⇨11(1).
C.J.S. Licenses § 30 et seq.

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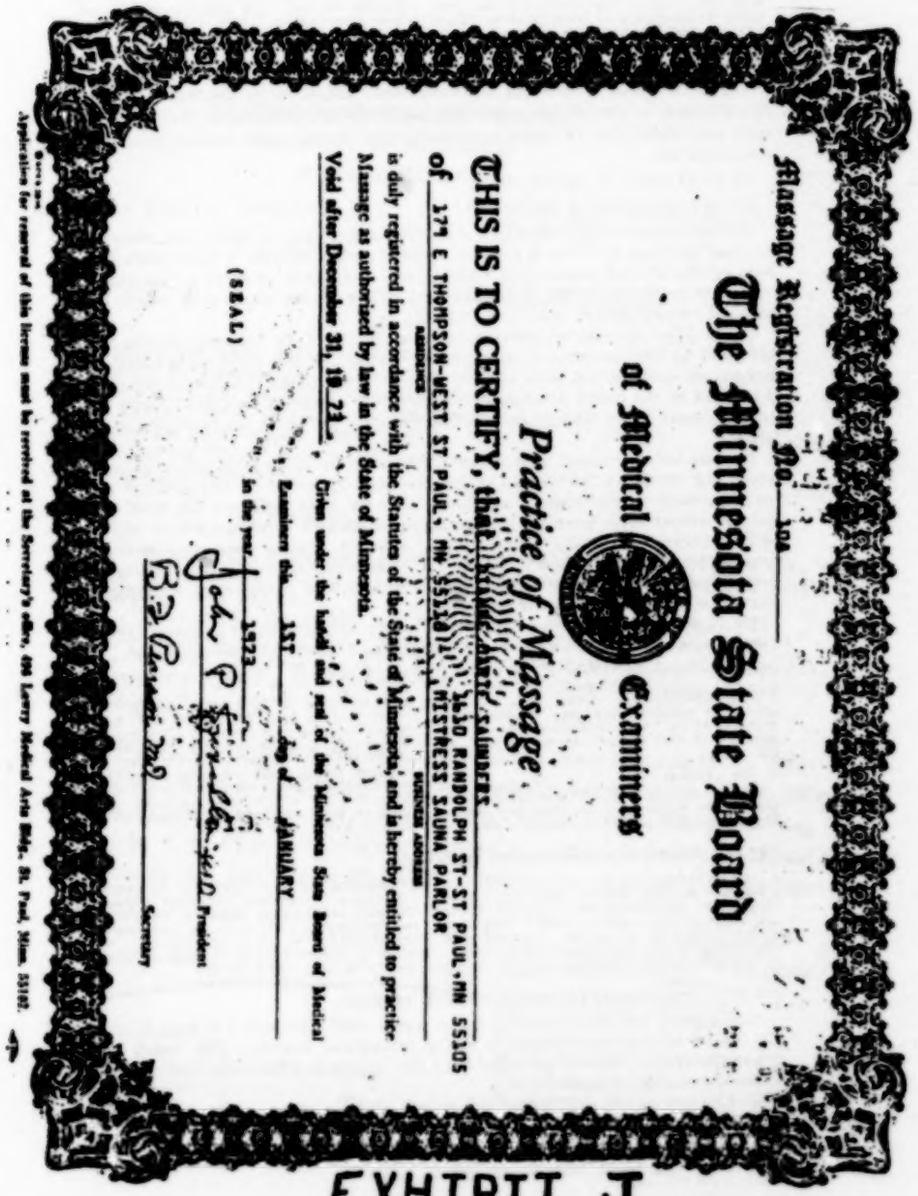
EXHIBIT J



Massage Registration No. 108

The Minnesota State Board

of Medical Examiners

Practice of Massage

THIS IS TO CERTIFY, that [illegible] 1610 RANDOLPH ST-ST PAUL-MN 55105
of 171 E THOMPSON-WEST ST PAUL, MN 55118 MISTRESS SAUNA PARLOR
is duly registered in accordance with the Statutes of the State of Minnesota, and is hereby entitled to practice
Massage as authorized by law in the State of Minnesota.
Void after December 31, 19 73

(SEAL)

Given under the hand and seal of the Minnesota State Board of Medical Examiners this 1ST day of JANUARY in the year 1973

John P. [illegible] M.D. President

B.E. [illegible] M.D. Secretary

Application for renewal of this license must be received at the Secretary's office, 606 Lowry Medical Arts Bldg. St. Paul, Minn. 55102.

EXHIBIT J

A-

EXHIBIT K

THE MINNESOTA
STATE BOARD OF MEDICAL EXAMINERS

August 1, 1977

Rev. Dianne Fennell
1612 Randolph
St. Paul, Minnesota, 55105

Dear Reverend Fennell:

RE: Massage Schools

The question you asked in your July 28, 1977 letter was answered in our letter of July 26, 1977.

There are no schools of massage registered with the Department of Education in the State of Minnesota.

Yours very truly,

Arthur W. Poore,
Executive Secretary

jw

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EXHIBIT L-1

ARTICLES OF INCORPORATION

OF

MINNESOTA SCHOOL OF MASSAGE, INC.

N-47,106

I, the undersigned, for the purpose of forming a corporation under and pursuant to the provisions of Chapter 300 of the Laws of Minnesota, 1933, known as the Minnesota Business Corporation Act, and any amendments thereto, do hereby adopt the following Articles of Incorporation.

ARTICLE I

The name of this corporation shall be Minnesota School of Massage, Inc.

ARTICLE II

The corporation shall have general business purposes.

124553

ARTICLE III

The corporation shall have all of the powers granted or available under the laws of the State of Minnesota and the laws amendatory thereof and supplementary thereto, including the power to acquire, hold, mortgage, pledge or dispose of the shares, bonds, securities and other evidences of indebtedness of any domestic or foreign corporation, including those of this corporation.

ARTICLE IV

The duration of this corporation shall be perpetual.

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EXHIBIT L-2

N-47, 107

ARTICLE V

The location and post office address of the registered office of this corporation in Minnesota is 54 West 7th Street, St. Paul, Minnesota 55102.

ARTICLE VI

The total authorized number of shares of this corporation shall be 25,000 shares of common capital stock with a par value of $1.00 per share, having an aggregate value of $25,000.00. There shall be no cumulative voting for any purpose.

ARTICLE VII

The amount of stated capital with which this corporation shall begin business is $1,000.00.

ARTICLE VIII

A. The general management of this corporation shall be vested in a Board of Directors consisting of not less than 1 nor more than 15 members, all of whom shall be elected by the holders of the common stock of this corporation at each annual meeting thereof. The directors shall serve for a term of one year and until their successors are duly elected and qualified.

B. The names and addresses of the First Board of Directors is:

EARL P. GRAY — W-1177 First National Bank, St. Paul, Minnesota 55101

ARTICLE IX

These Articles may be amended by the affirmative

A-

EXHIBIT L-3

N-47, 108

vote of the holders of a majority of the voting power of the common stock.

ARTICLE X

The Board of Directors shall have authority to make and alter By-Laws, subject to the power of the shareholders, to change or repeal such By-Laws, provided, however, that this Board of Directors shall not make or alter any By-Laws fixing the number, qualifications or term of offices of the Directors.

ARTICLE XI

The name and post office address of the incorporator shall be:

EARL P. GRAY W-1177 First National Bank St. Paul, Minnesota 55101

Earl P. Gray
EARL P. GRAY

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss

On this 25th day of November, 1977, before me a notary public personally appeared Earl P. Gray to me known to be the person who executed the foregoing Articles of Incorporation and acknowledged that he signed the same as the free act and deed of the corporation.

Patricia A. Lavazzi

STATE OF MINNESOTA
DEPARTMENT OF STATE
I hereby certify that the within instrument was filed for record in this office on the 30 day of Nov A. D. 1977 at 8 o'clock A.M. and was duly recorded in Book A-47 of Incorporations, on page 106
Joan Anderson Growe
Secretary of State

N-47, 109

BEST COPY AVAILABLE

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U.S.C.A. EXHIBIT M
NO. 77-1782

(Caption) NOTICE OF APPEAL

PLEASE TAKE NOTICE that the above named appellee Rev. Dianne Fennell, Attorney Pro Se, hereby notify the above named counselors for the Appellees-Appellants, that she is Appealing to the United States Supreme Court, Order dated February 6, 1978, by Judges Circuit Lay, Bright and Webster. Order dated February 28, 1978. Also the Court's denial of an injunction prohibiting the City of Saint Paul, Minnesota et al, from enforcing Amended City Ordinance No. 16321 until final determination of the Constitutionality of this above named ordinance Amendment.

Dated March 4, 1978

BY:
/s/ Rev. Dianne Fennell

REV. DIANNE FENNELL
Attorney Pro Se
1612 Randolph Ave
St. Paul, Minn.
55105

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
MAY 23 1978
MICHAEL RODAK, JR., CLERK

October Term 1977

No. 771579

REV. DIANNE FENNELL,

Appellant,

vs.

ROSALIE BUTLER, Councilwoman; DONALD D. WOZNIAK; HARRIET LANSING, City Attorney; PHILIP B. BYRNE, Deputy City Attorney; JAMES M. CAMPBELL; and the MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Appellees.

ON APPEAL FROM THE UNTED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW AND MEMORANDUM BY APPELLEE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
ROBERT T. HOLLEY
Special Assistant
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Attorneys for Appellee
Minnesota State Board
of Medical Examiners

May, 1978

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Motion to Dismiss or Affirm	2
Statement	3
A. Question Presented and State Statute Involved	3
B. Proceedings Below	4
Argument Supporting Motion	5
A. The Court Is Without Direct Appeal Jurisdiction From The District Court In The Instant Case	5
B. This Case Does Not Present A Substantial Federal Question	6
C. The Decision Of The District Court Is Plainly Correct	7
Memorandum Opposing Certiorari	8
Conclusion	9

TABLE OF AUTHORITIES

	PAGE
Rules and Statutes:	
Supreme Court Rule 16	2
Supreme Court Rule 20	8
18 U.S.C. § 3731	5
28 U.S.C. § 1252	5
28 U.S.C. § 1253	5
49 U.S.C. § 45	5
Minn. Laws 1935, ch. 245	3, 7
Minn. Laws 1967, ch. 845, § 4	7
Minn. Stat. § 147.171 (1976)	3, 6, 7, 8
Cases:	
Arbuckle v. Blackburn, 191 U.S. 405 (1903)	6
Baker v. McGinnis, 286 F.Supp. 280 (D.C.N.Y. 1968)	6
Moore v. Kusper, 465 F.2d 256 (7th Cir. 1972)	6
Powell v. Alabama, 287 U.S. 45 (1932)	6

IN THE

Supreme Court of the United States

October Term 1977

No. 771579

REV. DIANNE FENNELL,

Appellant,

vs.

ROSALIE BUTLER, Councilwoman; DONALD D. WOZNIAK; HARRIET LANSING, City Attorney; PHILIP B. BYRNE, Deputy City Attorney; JAMES M. CAMPBELL; and the MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Appellees.

ON APPEAL FROM THE UNTED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court for the United States, appellee Minnesota State Board of Medical Examiners (hereinafter "Board") moves that the appeal herein be dismissed or, in the alternative, that the final judgment and decree of the United States District Court for the District of Minnesota be affirmed on the following grounds:

A. Direct appeal to the Court is unavailable as to the question sought to be reviewed.

B. It is manifest that the question presented is so unsubstantial as not to need further argument.

C. The judgment at issue was obviously correct.

I

STATEMENT

A. Question Presented And State Statute Involved.

Although Rev. Dianne Fennell (hereinafter "appellant") has not clearly delineated the procedural posture of this case, the Board interprets appellant's present action as a direct appeal from the final judgment and decree entered on March 27, 1978, by a one-judge federal district court dismissing an action by appellant in which she sought to compel the Board to issue a permanent massage license to her. Additionally, in what appears to be a separate but concurrent attempt to seek the Court's assumption of jurisdiction, appellant is also petitioning the Court for writ of certiorari.

In both instances, the sole question raised with respect to the Board has been set forth by appellant as follows:

> Should a U.S. District Judge, be required to compel an assistant Minnesota Attorney General and a State agency, the "Minnesota State Board of Medical Examiners," to obey a State statute M.S.A. 147.171, and issue to Appellant a permanent massage license?

(*Sic.*) Appellant's Statement as to Jurisdiction at 5; Petition for Writ of Certiorari at 3.

In its entirety, the state statute in question provides:

> Any person who was licensed under Laws 1935, Chapter 245 may apply to the board of medical examiners for a permanent license. The board shall grant the request if it is satisfied that the applicant previously held a license under Laws 1935, Chapter 245.

Minn. Stat. § 147.171 (1976).

B. Proceedings Below.

On July 25, 1977, appellant filed a *pro se* summons and complaint in the United States District Court, District of Minnesota, Third Division, seeking a declaratory judgment, injunctive relief and damages relating to her practice of massage and operation of a sauna in St. Paul, Minnesota.[1] The complaint alleged that the Board improperly refused to issue her a permanent massage license.

On September 16, 1977, appellant moved the District Court for a preliminary injunction to require the Board's issuance of the license. This motion was denied on September 23, 1977 (Alsop, J.).

Thereupon, on September 29, 1977, appellant noticed an appeal of the matter to the United States Court of Appeals for the Eighth Circuit. In an order filed on February 6, 1978, the Court of Appeals vacated the District Court's order, remanded the case for further proceedings consistent with alternative criteria for preliminary injunctions, and urged the case's consolidation with another. Upon reconsideration of the matter, on March 10, 1978, the District Court granted appellant's motion for a preliminary injunction as to all appellees except the Board.

Shortly thereafter, on March 27, 1978, the District Court granted a pending motion by the Board ordering the dismissal of appellant's action for failure to state a claim upon which relief can be granted and entered final judgment in the matter.[2] On or about April 19, 1978, appellant noticed an appeal of the District Court's order to the Eighth Circuit Court of Appeals.[3] Despite a number of ambiguities in her jurisdictional statement, it is believed that this is the same order for which she now seeks the Court's review by appeal and for which she has simultaneously filed a petition for writ of certiorari. The matter also remains before the Eighth Circuit where it has been docketed[4] but not yet briefed by appellant.

[1] No state administrative or state court proceedings preceded the filing of the federal district court action.
[2] A-1-3.
[3] A-4, 5.

II

ARGUMENT SUPPORTING MOTION

A. The Court Is Without Direct Appeal Jurisdiction From The District Court.

This Court's jurisdiction over direct appeals from federal district courts is confined to certain types of cases under limited circumstances, to-wit: (1) cases which involve the constitutionality of federal statutes (28 U.S.C. §1252); (2) criminal matters presenting judgments adverse to the United States (18 U.S.C. § 3731); (3) civil actions required to be heard by three judges (28 U.S.C. §1253); and (4) actions brought by the United States to enforce specific laws such as the Interstate Commerce Act (49 U.S.C. § 45). As this appeal relates instead to a federal district court ruling pertaining to the actions of a state agency under a state statute,[5] it is clear that the instant matter does not lie within this Court's appellate jurisdiction.

Moreover, appellant has made no attempt to indicate how her appeal might reasonably relate to the Court's direct appeal jurisdiction. Appellant's jurisdictional statement simply asserts:

[4] A-5, 6.
[5] Appellant's Statement as to Jurisdiction at 5.

> The jurisdiction of this Court is invoked under Title 28 of the U.S. Code Sections 2201 and 2202: 1331, 1343 (1-4), Title 42 of the U.S. Code Sections 1981 thru 1995.

(*Sic.*) Appellant's Statement as to Jurisdiction at 2. Nothing further is offered which might be construed as explaining the present jurisdictional application of these references to declaratory judgments, district court jurisdiction, and to parts of the Civil Rights Act.

Based on the foregoing, it is apparent that jurisdiction is lacking and that the appeal should be dismissed.

B. This Case Does Not Present A Substantial Federal Question.

As previously noted, the sole question presented by appellant is whether the Board's refusal to issue a permanent massage license to her has violated Minn. Stat. §147.171 (1976). It is obvious, however, that appellant's objections to a particular construction of this state law, or to a certain course of conduct by state officials under it, do not require the Court's appellate review. Appellant's allegations are merely conclusional and fail to indicate how, if at all, the Board's denial of her request for permanent licensure might be regarded as a violation of the United States Constitution or federal law. Under such circumstances, the question presented must be viewed not only as unsubstantial but non-federal in nature and patently insufficient to invoke the Court's jurisdiction. *See, e.g., Arbuckle v. Blackburn,* 191 U.S. 405 (1903); *Powell v. Alabama,* 287 U.S. 45 (1932); *Moore v. Kusper,* 465 F.2d 256 (7th Cir. 1972); *Baker v. McGinnis,* 286 F. Supp. 280 (D.C. N.Y. 1968).

C. The Decision Of The District Court Is Plainly Correct.

Appellant's contention that the Board has violated state law, Minn. Stat. § 147.171 (1976), by not issuing a permanent massage license to her is founded on the wholly invalid assumption that the Board possesses the authority to grant her such a license. Under section 147.171, the Board's licensure authority over masseuses and masseurs is expressly limited to those persons previously licensed under Minn. Laws 1935, Ch. 245. Appellant was never so licensed.

Appellant was registered without examination by the Board from 1970 through 1974, but her status as a registrant did not commence until some three years after the Board's massage examination and licensing authority under Laws 1935, Chapter 245, was removed by the state legislature.[6] Furthermore, appellant neither now offers nor did she offer in the proceedings below any evidence or legal argument to refute the foregoing.

Accordingly, as a matter of simple statutory construction, it is clear that the District Court's dismissal of appellant's action for failure to state a claim upon which relief can be granted was correct.

---

[6] An affidavit with exhibit attachments submitted in preliminary injunction proceedings below regarding the history of appellant's status with the Board appears at A-7-14. Minnesota Laws 1935, Chapter 245, is at A-15-16. Minnesota Laws 1967, ch. 845 § 4, which discontinued the Board's licensing authority under Laws 1935 is at A-16-17.

III

MEMORANDUM OPPOSING CERTIORARI

Previous reference has been made to the identity of the questions presented by appellant on appeal and in her petition for a writ of certiorari. *Supra* at 3. In essence, she is seeking the Court's review of a final judgment of March 27, 1978, entered by the United States District Court for the District of Minnesota dismissing an action by appellant against the Board, a state agency, relative to the interpretation of a state massage licensing statute (Minn. Stat. §147.171 (1976)). No conflict of court decisions is presented. Additionally, appellant has appealed the same matter to the United States Court of Appeals for the Eighth Circuit where it is presently pending.[7]

Without more, the foregoing facts clearly require denial of appellant's petition for a writ of certiorari. That the instant question of a state statute's interpretation not involving a conflict of decisions fails to present an important federal question, or a federal question of any nature, seems obvious. Moreover, the present pendency of this same matter in the Court of Appeals quite plainly forecloses a grant of the requested writ. Under Rule 20 of the Court, deviation from normal appellate processes is justified only upon a showing that the case is of such imperative public importance that the Court's immediate decision is required. No such showing has been or can be made in this case. Indeed, appellant's petition offers no indication that the question she presents may affect or be important to anyone except the litigants. Finally, as has previously been discussed, it cannot reasonably be doubted that the decision of the District Court in this matter was correct. On its face, Minn. Stat. §147.171 precludes appellant's licensure by the Board.

---

[7] A-4-6.

IV

CONCLUSION

For the foregoing reasons, appellee Board moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered by the District Court. Further, the Board urges the Court to deny this petition for writ of certiorari.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
ROBERT T. HOLLEY
Special Assistant
Attorney General
232 Minnesota Health
Dept. Bldg.
717 Delaware Street Southeast
Minneapolis, Minnesota 55440
Telephone: (612) 296-5518
Attorneys for Appellee,
Minnesota State Board of
Medical Examiners

APPENDIX

UNITED STATES DISTRICT COURT

District of Minnesota — Third Division

REV. DIANNE FENNELL,

Plaintiff,

vs.

ROSALIE BUTLER, Councilwoman; HARRIET LANSING, City Attorney; PHILIP B. BYRNE, Deputy City Attorney; and THE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Defendants.

MEMORANDUM ORDER

Rev. DIANNE FENNELL, St. Paul, Minnesota, appeared pro se.

Warren Spannaus, Attorney General, State of Minnesota, by ROBERT T. HOLLEY, Esq., Special Assistant Attorney General, St. Paul, Minnesota, appeared for defendant Minnesota State Board of Medical Examiners.

Harriet Lansing, St. Paul City Attorney, by BERYL M. NORD, Esq., Assistant St. Paul City Attorney, St. Paul, Minnesota, appeared for all other defendants.

This matter comes before the court on the motion of the defendant Minnesota State Board of Medical Examiners (Board) to dismiss.

The only relief which the plaintiff seeks from the Board is the issuance to her of a permanent license to practice massage.

Minn. Stat. § 147.171 authorizes the Board to issue such permanent licenses only to persons licensed pursuant to Laws 1935, Chapter 245. The plaintiff does not allege that she was ever licensed by the Board to practice massage.[1] Therefore, she does not state a claim upon which relief could be granted.

Moreover, the Board's refusal to issue a permanent license to the plaintiff denies her no right or privilege. It is not necessary that a person who practices massage in the State of Minnesota hold a license issued by the Board. If the Board were to issue a permanent license to the plaintiff, she would still be required to comply with any applicable provisions of an ordinance adopted by the council of any city in which she wishes to practice massage. *Cf. Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 143 N.W.2d 813 (1966). Therefore, the Board's actions, even if they were to be wrongful, would not deny the plaintiff either due process or equal protection.

Upon the foregoing,

IT IS ORDERED That the motion of the defendant Minnesota State Board of Medical Examiners to dismiss for failure to state a claim be and hereby is granted, and the above-entitled action is dismissed as to the Minnesota State Board of Medical Examiners.

IT IS FURTHER ORDERED That, based upon the court's express determination that there is no just reason for delay, the Clerk shall enter judgment accordingly.

Dated: March 27, 1978.

DONALD D. ALSOP
United States District Judge

---

[1] Previously, the Board did accept the plaintiff's application for *registration* to practice massage. However, that registration does not make the plaintiff eligible for permanent licensing.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. Civil 3-77-338 Civil

REV. DIANNE FENNELL,

Plaintiff,

vs.

ROSALIE BUTLER et al.,

Defendant.

You are hereby notified that in the above-entitled case on the 27th day of March, 1978, filed and entered Memorandum Order (Alsop-J 3-27-78) that motion of Deft. Minnesota State Board of Medical Examiners to dismiss for failure to state a claim be and hereby is granted and action is dismissed as to the Minnesota State Board of Medical Examiners. Further ordered that, based upon the Court's express determination that there is no just reason for delay, the Clerk shall enter judgment accordingly.

BERNADINE L. BROWN
Deputy Clerk

JUDGMENT ENTERED

TO: Rev. Dianne Fennell, 1612 Randolph Ave., St. Paul, Minnesota 55105; Beryl A. Nord, Asst. City Atotrney, 647 City Hall & Court House, St. Paul, Minnesota 55102; Robert M. Mahoney, Geraghty, O'Loughlin & Kenney, 707 Degree of Honor Bldg., St. Paul, Mn. 55101; Robert T. Holley, Special Assistant Attorney General, 232 Minnesota Health Department Bldg., 717 Delaware Street S.E., Minneapolis, Mn. 55440.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
File No. 3-77-338
CIV
REV. DIANNE FENNELL,

Plaintiff,

vs.

ROSALIE BUTLER, Councilwoman; DONALD D. WOZNIAK; HARRIET LANSING, City Attorney; PHILIP B. BYRNE, Deputy City Attorney; JAMES M. CAMPBELL; and THE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Defendants.

NOTICE OF APPEAL

TO: Beryl A. Nord, at 647 City Hall & Court House, St. Paul, Minn. 55102. Attorney for defendants, Butler, Lansing, and Bryne. Robert M. Mahoney, at 707 Degree of Honor Bldg., Cedar St., St. Paul, Minn. 55101. Attorney for Wozniak and Campbell. Robert T. Holley, 717 S.E. Delaware St., Mpls., Minn. 55440, Attorney for The Minnesota State Board of Medical Examiners. Griffin Bell, Attorney General, U.S. Justice Dept., Washington, D.C. 49149. Elizabeth A. Eagan, U.S. Assistant District Attorney, for the District of Minn. Third Division, 596 Federal Court House, U.S. Justice Dept., Mpls., Minn. 55401.

PLEASE TAKE NOTICE that the above named Plaintiff, Rev. Dianne Fennell, Attorney Pro Se, hereby notify the above named Counselors for the defendants and all parties, in the above case, that she is appealing to the Eight U.S. Circuit Court of Appeals, Judge Donald D. Alsop's Order Dated March 27, 1978, dismissing The Minnesota State Board of Medical

Examiners, and also in which Judge Alsop, ignored Plaintiff's Motion for Summary Judgment, against Defendant, The Minnesota State Board of Medical Examiners, requiring it to issue his Order directing defendant, Minnesota State Board of Medical Examiners, to grant a permanent massage license to plaintiff, which hearing was held on January 6, 1978 and plaintiff requested summary Judgement from defendant Minnesota State Board of Medical Examiners. Also obey Minnesota Statutes Annotated 147.171 (1976), and to grant damages to plaintiff as prayed for in her complaint. Plaintiff further objects to Judge Alsop's deferring issuance of his decision at this time, a delay of 3 months, because he lacks jurisdiction; this case is presently on appeal to the United States Supreme Court.

Dated: April 19, 1978

REV. DIANNE FENNELL
Attorney Pro Se
1612 Randolph Avenue
Saint Paul, Minn. 55105

Filed April 26, 1978.

HARRY A. SIEBEN
Clerk

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, MO 63101
April 28, 1978

Ms. Dianne Fennell
1612 Randolph Avenue
St. Paul, Minnesota 55105

Re: No. 78-1295. *Rev. Dianne Fennell, Appellant* vs. Rosalie Butler, Councilwoman; Donald D. Wozniak; Harriet Lansing, City Attorney; Philip B. Byrne, Deputy City Attorney;

James M. Campbell, *The Minnesota State Board of Medical Examiners,*

Appellee.

Dear Ms. Fennell:

I have your letter of April 24, 1978, enclosing check in the sum of $50.00 to cover docketing fee in this Court in the above case, and receipt therefor is enclosed. The appeal is docketed today under the above number.

The appendix and brief for appellant are due to be served and filed within forty days from this date. By direction of the Judicial Council of the Eighth Circuit, you are hereby notified that the provisions of the Federal Rules of Appellate Procedure as to the times for filing appendix and briefs are to be strictly enforced.

I am directed by the Court to invite your attention to Rules 10(c) and 10(d) of the Federal Rules of Appellate Procedure. The Court expects counsel to make every effort to expedite the submission of this appeal and if recourse to these two rules will facilitate prompt briefing of the case, counsel are urged to adopt the practices outlined in the rules.

Very truly yours,
ROBERT C. TUCKER
Clerk

lp

cc Mr. Robert T. Holley, Special Asst. Attorney General, 232 Minnesota Health Department Bldg., 717 Delaware Street, S.E., Minneapolis 55440; Mr. Harry A. Sieben, Clerk, U.S. District Court, 316 N. Robert St., St. Paul, Minnesota 55101 (3-77-338)

P.S. Mrs. Fennell:

If it is your intention to proceed in accordance with Local Rule 11, you should file a motion to do so promptly.

II.
Affidavit of Arthur W. Poore and its Exhibit Attachments

Affidavit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action File No. 3-77-338

REV. DIANNE FENNELL,

Plaintiff,

vs.

ROSALIE BUTLER, Councilwoman; DONALD D. WOSNIAK; HARRIET LANSING, City Attorney; PHILIP B. BYRNS, Deputy City Attorney; JAMES M. CAMPBELL; and THE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Defendants.

AFFIDAVIT OF ARTHUR W. POORE

State of Minnesota
County of Hennepin—ss.

ARTHUR W. POORE, being first duly sworn upon oath, deposes and says:

1. That he is the Executive Secretary of the Minnesota State Board of Medical Examiners (hereinafter "Board") and has held said position continuously since 1967.

2. That in his capacity as Board Executive Secretary he is the official custodian of all Board massage license and registration records and keeps and maintains such records in the office of the Board.

3. That he has examined and is familiar with all Board records pertaining to applications filed with the Board for massage licensure and registration and with the Board's final actions upon said applications.

4. That, upon information and belief, plaintiff was formerly known as Diane Marie Wincek Saunders.

5. That the hereto attached Exhibit 1 is a true and correct copy of the official original Board record of plaintiff's, by her former name, initial application to the Board for massage registration or licensure and that the date shown thereon of November 20, 1970, is the true date of the Board's approval, upon an interview only and without examination, of plaintiff's initial massage registration application.

6. That the hereto attached Exhibit 2 is a true and correct copy of the official record of the Board's massage registration and licensure book and that it accurately shows, in chronological order of issuance, the pertinent dates associated with Board massage licensure . ' registration, together with the number assigned by the L. 'd to each successful applicant therefor; that Exhibit 2 accurately shov s that plaintiff was not licensed or registered by the Board to practice massage at any time or by any known name before 1970; that Exhibit 2 accurately shows that plaintiff was registered by the Board to practice massage only from 1970 through 1974 and that her assigned registration number was #108.

7. That the hereto attached Exhibits 3, 4, 5, and 6 are true and correct copies of original correspondence between plaintiff and the Board respecting requests by plaintiff in 1977 for the Board's issuance to her of a permanent massage license and the Board's necessary denial of same by reason of plaintiff not having previously been licensed prior to 1967.

8. That written notice of plaintiff's notice of motion and motion for preliminary injunction in the instant matter was

first received by the Board by first class mail on Tuesday, August 23, 1977.

Further affiant saith not.

ARTHUR W. POORE

Subscribed and sworn to before me this 25th day of August, 1977. — Marie B. Tromiczak, Notary Public, Hennepin County, Minnesota. My commission expires October 9, 1980.

EXHIBIT 1

(Exhibit 1 is a reproduction of Rev. Fennell's, the former Dianne Marie Wincek Saunders', initial massage registration application to the Board. Only those portions of the application which include the date of Board approval and the applicant's affidavit are presented here.)

DIANNE SAUNDERS
MINNESOTA STATE BOARD OF
MEDICAL EXAMINERS
496 Lowry Medical Arts Bldg.
St. Paul, Minnesota 55102

Application for Registration to Practice Massage

Name: Dianne Saunders
Preliminary Education: Stanley-Boyud H.S., Stanly, Wis.
Massage Education: Nov. 69 till present at Pam's Sauna
School of Graduation:
Massage Certificate:
Massage Diploma:
Massage Experience: Pam's Sauna, Prior Ave., St. Paul
Application No.: 25
Approval Date: November 20, 1970
Registration No.: 108
Issued: November 20, 1970
Fee Paid: $25.00 Sept. 8, 1970
Receipt No. 9214

AFFIDAVIT OF APPLICANT

State of Minnesota
County of Washington—ss.

Dianne Marie Saunders on being duly sworn, says that he is the person referred to in the above application for registration to practice massage in the State of Minnesota, and that the statements herein contained are each and all strictly true in every respect.

DIANNE SAUNDERS

Sworn to before me this 9th day of September, 1970.—Marian P. Deilke, Notary Public, Washington County. My commission expires March 4, 1977.

EXHIBIT 2

(Exhibit 2 is a reproduction of Board records showing the names and dates of initial application and registration for some 463 state massage registrants through 1974. Only that portion of Exhibit 2 pertinent to the initial application and registration of Rev. Fennell (formerly Dianne Marie Wincek Saunders) is shown here.)

108. Saunders, Diane Marie Wincek (Fennell marr. 1974)

Application Fee	Annual Reg. 1970	Annual Reg. 1971
4/8/70	12/18/70	3/8/71

Annual Reg. 1972	Annual Reg. 1973	Annual Reg. 1974
12/9/71	1/8/73	12/26/73

EXHIBIT 3

June 30, 1977

Chairman
Minnesota Board of Medical Examiners
717 South East Delaware Street
Minneapolis, Minnesota

Re: Application For Permanent License For Practicing Massage (Masseuse).

Dear Sir,

Enclosed is my check in the amount of Twenty-Five ($25.00) Dollars for my Permanent License for Practicing Massage (Masseuse) at my Sauna Parlor known as the "Mistress Sauna Parlor" located at 1612 Randolph Avenue, St. Paul, Minnesota in the County of Ramsey.

I reside at 5870 Tower Drive, Woodbury, Minnesota 55055 in Washington County; and my date of birth is December 10, 1945.

This application is made pursuant to Minnesota Session Laws of 1976 Chapter 222 Section 42.

Thank you.

Sincerely,
REV. DIANNE FENNELL
5870 Tower Drive
Woodbury, Minnesota 55055

Encl. My check $25.00
Massage Reg. No. 108
Dianne Marie-Wincek-Saunders-Fennell
Dianne Marie Wincek Saunders Fennell—Massage Reg. 108
Enc: Copy of my certificate of marriage.

EXHIBIT 4

THE MINNESOTA STATE BOARD OF
MEDICAL EXAMINERS

July 5, 1977

Ms. Dianne Fennell
5870 Tower Drive
Woodbury, Minnesota 55055

Dear Ms. Fennell:

We are returning herein your check in the amount of $25.00 as the Massage Law was abolished by 1974 Minnesota Session Laws Chapter 62 Section 4.

At the present time there is no licensure or registration required by the State Government to practice massage. You should contact the City Licensing Department where you wish to practice.

Sincerely yours,
ARTHUR W. POORE
Executive Secretary

ea
enc.

EXHIBIT 5

July 8, 1977

Arthur W. Poore
Executive Secretary
State Board of Medical Examiners
Room 352, 717 S.E. Delaware
Minneapolis, Minnesota 55414

Re: M.S.A. 171—Licensing of Persons practicing massage, "Minn. Session Laws 1976, C. 222 Section 42, eff. July 1, 1976.

Dear Mr. Poore,

This is to acknowledge your letter of July 5, 1977, indicating I, should contact the city Licensing Department. However Minn. Statutes in reference above indicates the State again has the power to issue license's as of July 1, 1976.

I, am returning my check for Twenty Five Dollars ($25.00), for a License to massage under number (108), my previous license number.

Thank you.

Sincerely yours,
DIANNE FENNELL
5870 Tower Drive
Woodbury, Minn. 55055

enc.

EXHIBIT 6
THE MINNESOTA STATE BOARD OF
MEDICAL EXAMINERS

July 13, 1977

Ms. Dianne Fennell
5870 Tower Drive
Woodbury, Minnesota 55055
Dear Ms. Fennell:

We are again returning your check no. 2202 in the amount of $25.00 which you will find enclosed herein. We cannot reinstate your license to practice massage as the law you refer to pertains only to those persons licensed prior to 1967.

Sincerely yours,
ARTHUR W. POORE
Executive Secretary

ea
enc.

III.
Statutes

Minn. Laws 1935, ch. 245

Section 1. Licenses to practice massage. Masons' Statutes of 1927, Section 5784-16, is hereby amended to read as follows:

'5784-16. The Board shall issue licenses to practice massage only to persons qualified therefore under the provisions of this act after examination as herein provided, upon application in manner and form as prescribed by the Board and payment thereto of a fee of $25.00; provided however that licenses may be renewed by the Board without examination upon application and payment of a renewal fee of *Three Dollars*; and licenses issued pursuant to existing law and outstanding at the time of the passage of this act are hereby continued in force and effect until the same shall expire unless sooner revoked by the Board, as provided for in this act, and shall be renewed by the Board without examination upon application and payment of a renewal fee of *Three Dollars*, except as in this act otherwise provided for; application for renewal of license as herein provided for shall be made to the Board on or before May 31st of each year, and shall be accompanied by the renewal fee of *Three Dollars*; provided, further that the Board in its discretion may without examination upon the payment of a fee of $50.00 issue a license to any person qualified to practice massage in any other state or territory whose requirements for such practice are equivalent to the requirements of this state therefor. Licenses shall be in such form as the Board shall by rule prescribe, shall specify the name, residence and business location of the licensee and state that he is authorized to practice massage in the State of Minnesota; licenses shall bear the date of issuance and the date of expira-

tion thereof and shall be signed by the President and Secretary-Treasurer of the Board and bear its official seal. All licenses shall expire on May 31st next and after the issuance thereof unless sooner revoked as herein provided.'

Minn. Laws 1967, ch. 845

Sec. 4. Minnesota Statutes 1965, Section 148.36, is amended to read:

148.36 Registration, by whom issued. The state board of medical examiners shall ~~issue licenses~~ *register persons* to practice massage only ~~to persons~~ *if they are* qualified therefor under the provisions of sections 148.33 to 148.51 after an ~~examination~~ *interview* as therein provided, upon application in manner and form as prescribed by the board and payment thereto of a fee of $25. ~~Licenses~~ *Registrations* may be renewed by the board without *an* ~~examination~~ *interview* upon application and payment of a renewal fee of $3 ;. ~~and~~ Licenses issued pursuant to existing law and outstanding at the time of the passage of ~~sections 148.33 to 148.51~~ *this act* are hereby continued in force and effect until ~~the same shall expire~~ *May 31, 1967*, unless sooner revoked by the board, as provided for in sections 148.33 to 148.51, and shall be renewed *as a registration* by the board without *an* ~~examination~~ *interview* upon application and payment of a renewal fee of $3 *before May 31, 1967*, except as in sections 148.33 to 148.51 otherwise provided ;. Application for renewal of ~~license~~ *a registration* shall be made to the board on or before ~~May~~ *December* thirty-first of each year and accompanied by the renewal fee of $3. The board, in is *its* discretion, may, ~~without examination~~, upon the payment of a fee of $50, ~~issue a license to~~ *register* any person qualified to practice massage in any other state or territory whose requirements for such

practice are equivalent to the requirements of this state therefor. ~~Licenses~~ *Certificates of registration* shall be in such form as the board shall by rule prescribe, specify the name, residence, and business location of the ~~licensee~~ *registrant*, and state that he is authorized to practice massage in this state; ~~license~~ *they* shall bear the date of issuance and the date of expiration thereof, be signed by the president and secretary-treasurer of the board, and bear its official seal. All ~~licenses~~ *registrations* shall expire on ~~May~~ *December* thirty-first next after the issuance thereof, unless sooner revoked as provided in sections 148.33 to 148.51.

Supreme Court, U. S.
FILED
JUN 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1579

REV. DIANNE FENNELL,

Appellant,

vs.

ROSALIE BUTLER, Councilwoman; DONALD D. WOZNIAK; HARRIET LANSING, City Attorney; PHILIP B. BRYNE, Deputy City Attorney; JAMES M. CAMPBELL; and the MINNESOTA STATE BOARD OF MEDICAL EXAMINERS,

Appellees.

APPELLANT'T MOTION TO DISMISS APPELLEE'S (THE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS) MOTION TO DISMISS OR AFFIRM DATED MAY 1978

Rev. Dianne Fennell
Attorney Pro Se
Appellant -Petitioner
1612 Randolph Avenue
St. Paul, Minnesota 55105

June 1978

INDEX

JURISDICTION ---------- 1

CONSTITUTIONAL PROVISIONS

U.S. AMEND. 5th. & 14th. -------- 1
MINN. STATE CONST. ART. I,
II, 7&8 ---------- 1
42 s 2000 et seq. (1964 Fed.
Civil Rights Act) ---------- 1&7
St. Paul City Ordinance
No. 16321 Amended ---------- 4&5

STATUTORY PROVISIONS INCLUDED
& INVOLVED MINN. STATUTES
ANNOTATED 147.171, eff. JULY
1, 1976 ---------- 2&5

M.S.A 8.01 ---------- 3
M.S.A 8.02 ---------- 3

CASES

RE LORD, 1959, 255 Minn.
370, 97 N.W. 2d. 287 ----------4&5

DUNN V. SCHMIDT, 60 N.W. 2d 14 --5
239 Minn. 559

SLEZAK V. OUSDIGIAN 110 N.W. 2d--5
1, 260 Minn. 303

UNITED STATES V. SHIPP, --------- 6
203 U.S. 563, 27 S. Ct. 165, 51 L.
Ed. 319, 8 Ann. Cas. 265

MCCALL V. SHAPIRO---------- 6
C.A. CONN. 1969, 416 F. 2d 246

RICCIOTTI V WARWICK SCHOOL
COMMITTEE D.C.R.I. 1970, -------- 6
319 F. Supp. 1006

NAACP V. ALLWN---------- 7
493 F. 2d at 621 (1964)

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

NO.

REVEREND DIANNE FENNELL,

Petitioner,

v.

ROSALIE BUTLER, Councilwoman,
DONALD D. WOZNIAK, HARRIET
LANSING, City Attorney, PHILIP
B. BRYNE, Deputy City Attorney,
JAMES M. CAMPBELL, and the
MINNESOTA STATE BOARD OF
MEDICAL EXAMINERS,

Respondent.

APPELLANT'S MOTION TO DISMISS APPELLEE'S
(THE MINNESOTA STATE BOARD OF MEDICAL EXAMINERS)
MOTION TO DISMISS OR AFIRM DATED MAY 1978

TO THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THIS COURT:

JURISDICTION

This is a civil action seeking Decaratory Judgement, and Damages because of deprivation under color of state law, statue, regulation, city ordinance, custom of usage, rights, privileges and immunities secured under the Minnesota State Constitution and United States Constitution. The jurisdiction of this Court is involked pursuant to Title 28 of U.S. Code Sections 2201 and 2202; 1331, 1343 (1-4); Title 42 of the U.S. Code Sections 1981 thru 1995. Title 42 § 2000 et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendments V and XIV Amendments to the Federal Constitution and laws of the statue of Minnesota. Title 28 U.S.C. § 2201-2202; 1331, 1343 (1-4), Title 42 U.S.C. § 1981-1995 and 42 § 2000 et seq. and M.S.A. 147.171, Session Laws 1976, c. 222, § 42 effective July 1, 1976.

MEMORANDUM

Comes now Rev. Dianne Fennell, Petitioner, in the above entitled action and in her Counter Motion moves this Court to Dismiss the Motion to Dismiss or Affirm by one of Appellees, the Minnesota State Board of Medical Examiners, because the jurisdiction lies with the Federal Court's on a Federal Civil Rights and a Federal Constitutional issue and essentially it is whether this Court can compell a state attorney general to obey a state law which is sound and hasn't been attacked on any constitutional point if it has--Counsel (Holley), for Appellees hasn't made the chargewho happens to be on very thin ice. Since Robert T. Holley, Special Assistant Attorney General to the Minnesota State Attorney General, Warrern Spannus, has in open Court stated that he and his office refuses to obey Minn. Statutes Annotated 147.171 (1976)c.222 , and issue a permanent massage license to Rev. Fennell, Appellant, pursuant to her nurmerous request, even though when questioned by (Alsop-J), he Holley, could not come up with any reason whatsoever for failor to comply. [1]

---

1 see transcript of hearing dtd. 11-18-77 as, 54

On Nov. 18, 1977, appellant had moved the District Court for an Order to Compell this defendant to issue a state license to her, but without any reason why Holley, wouldn't comply, (Alsop-J) found that he wouldn't compell him to comply even though Holley stood in court with out explaination and dumbfounded.

Minnesota Statutes Annotated 8.01 requires:

> "The attorney general shall appear for the state in all causes in the Supreme and Federal Courts where in the state is directely interested; also in all civil causes of like nature in all other courts of the state * * *."

and he may hire employees etc., M.S.A.8.02

> "The attorney general may appoint, and at his pleasure remove, three deputy attorneys general and 12 assistant attorneys general, who who shall aid as he may require of them in the discharge of his officeial duty."
>
> " * * * and each of such assistants shall, * * * have authority to appear * * * in any court of this state, as the attorney general himself might do."
>
> " * * * such assistant, (for) the proconduct of its legal business."

Futher, "Although the attorney general is a part of the executive branch of goverment, as an attorney he is also an "Officer of the Court", and when he appears in court in a legal matter, he is

acting as an attorney and in no other capacity. In Re Lord, 1959, 255 Minn. 370, 97 N.W. 2d 287.

> " * * * The attorney general, as chief law officer of the state when not restricted or limited by statutory or constitutional provisions. * * *, as he deems necessary for the enforcement of the laws of the state * * * and the legislature may, within its authority to perscribe the functions of the attorney general, confer upon him by statue powers which pertain to the office at Common Law.
>
> It is generally held that the Common-law powers and duties of the attorney general are subject to increase, alternation, or abridgment by the legislature." 7 Am Jur 2d 6,7, & 8.

STATEMENT OF FACTS

With reference to the backgroung of this case, it was commenced on July 25, 1977,by Rev. Fennell, Appellant, as a result of a newly enacted St. Paul, Minnesota, City Ordinance No. 16321, which would require needless qualifications and in effect abolish the occupation of massagist, even though the practice of massage is authorized and duly licensed by the State of Minnesota's State Agency. Rev. Fennell, filed and action in United States District Court

of Minnesota seeking to determine the Constitutionality of the Ordinance No. 16321, because it fails to recognize the supremecy of M.S.A. 147.171, and that the U.S. District Court (Alsop-J), errored when he didn't Order the appellant (Minn. State Board of Medical Examiners), to issue a permanant massage license to Rev. Fennell, who was duly licensed by the State Board of Medical Examiners and their attorney Special Assistant Attorney General Robert T. Holley, the attorney general is possed of extensive common law powers which are inherent in his office Dunn v. Schmidt, 60 N.W. 2d 14, 239 Minn. 559. Slezak v. Ousdigian, 110 N.W. 2d 1, 260 Minn. 303. The Supreme Court has held that in preserving the separation of powers of the three branches of goverment, the governor has no power to clothe the attorney general with immunity from the disciplinary powers of the court when the attorney general appears in court as an attorney. In Re Lord 97 N.W. 2d 287. An attorney general is an "Officier of the court" when he appears in court on a legal matter. It sta-

ted it is " * * * it can hardly be assumed that an attorney in his position could not understand that part of c. 646, which * * *." Similar situation arose in United States v. Shipp, 203 U.S. 563, 27 S. Ct. 165, 51 L. Ed 319, 8 Ann. Cas. 265. McCall v. Shapiro, C.A. Conn. 1969, 416 F. 2d 246. "Federal Court jurisdiction under this section 42 § 1983, providing remedy for deprivation of federal constitutional or statutory rights, privileges or immunities under color of state law is not dependant on either diversity or citizenship or the monetary amount in question." Ricciotti v Warwick School Committee. D.C.R.I. 1970, 319 F. Supp. 1006. "Plaintiff in Civil Rights action need not allege defendants specific intent to deprive plaintiff of his constitutional rights." The Courts functions are to require governmental officials to obey the statutes enacted by the state legislature unless declared utherwise. The above constitutes a direct and willfull violation of appellant's federal constitutional, as well as her federal civil rights, and also, as set forth in

42 U.S.C. § 2000 et seq., this case raises the issue of sex discrimination as practiced by a govermental unit exploiting sex discrimination against an occupational class of citizens composed, for all practicle purposes of women and" * * * Title VII to include state agency with the statute's parameters. Pub. L. No. 92-261, § 2 (1), (3), (5), 86 Stat. 103, amending 42 U.S.C. § 42 2000 e (Supp. 1973), see NAACP v. Allwn, 493 F. 2d at 621 (1974).

CONCLUSIONS

Therefore, Appellant, Rev. Dianne Fennell, moves this Court to grant her Counter Motion to Dismiss Appallee's Motion's and to vacate the District Court's judgement because they are unimpartial and frivolous.

Further, that this Court, grant any and futher relief as necessary and proper.

Dated: June 6, 1978

BY: /s/ Rev. Dianne Fennell

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